Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1888

ORION RESEARCH INCORPORATED,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FIRST

CIRCUIT

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May 12, 1980

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Petitioner, Orion Research Incorporated, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on February 11, 1980.

OPINIONS BELOW

The opinions of the Court of Appeals for the First Circuit and the District Court for the District of Massachusetts are set forth in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on February 11, 1980. This petition for certiorari was filed within 90 days of this date. Jurisdiction is predicated on 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

In a suit seeking disclosure of documents under the Freedom of Information Act (5 U.S.C. §552), may a District Court grant summary judgment for the agency defendant pursuant to Exemption 4 (§552(b)(4)) solely upon the basis of its sua sponte, in camera inspection of the documents?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5

§552. Public information; agency rules, opinions, orders, records, and proceedings

* * * * * *

(b) This section does not apply to matters that are - . . .
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

* * * * * *

STATEMENT OF THE CASE

On February 7, 1975 the Environmental Protection Agency ("EPA") issued Request for Proposal #DU-75-B093 inviting proposals for development of a continuous hydrogen sulfide (H_2S) monitoring system. The Request for Proposal advised prospective bidders that information submitted would be subject to disclosure to the public pursuant to the Freedom of Information Act unless designated by the bidder as confidential information.

Orion Research Incorporated ("ORION") submitted a Technical Proposal, as did twelve other bidders. Of the thirteen submitted bids, three, including those of ORION and Meloy Laboratories, Inc. ("MELOY") were determined by the EPA to be in

the competitive range. These three bidders submitted revised technical and cost proposals. Although ORION was "low bidder", ORION'S revised Technical Proposal was found to be "technically unacceptable", and the contract was awarded to MELOY on June 30, 1975.

On August 11, 1975, ORION requested from the EPA a copy of the Technical Proposal submitted by MELOY. ORION'S request was denied on September 24, 1975 by E. T. Rhodes, the EPA Deputy Assistant Administrator. An appeal from this decision was similarly denied on December 19, 1975 by Robert V. Zener, EPA General Counsel. The EPA furnished ORION only the cover sheets of the Meloy Technical Proposal, consisting of the

cover page, table of contents,[1] and a brief description of the MELOY H_2S monitor. The EPA withheld the remainder.

ORION filed suit in the United States District Court for the District of Massachusetts on December 10, 1975 under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 to compel disclosure of the Meloy Technical Proposal.[2] The District Court's jurisdiction was based on 5 U.S.C. §552 (a)(4)(B). ORION moved for summary judgment on May 14, 1976.

On July 13, 1976, the EPA published an Amendment to Solicitation

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[1]The contents page indicated the Meloy proposal contained such information as: 1) "Program Schedule"; 2) "Experience and Facilities"; and 3) "Personal Qualifications".

No. DU-76-B286 seeking proposals for the field evaluation of MELOY'S hydrogen sulfide H_2S monitoring system developed pursuant to the contract awarded to MELOY in connection with FRP #DU-75-B093. In light of this disclosure, ORION submitted an affidavit that the Amendment disclosed a System Design Report of the very same MELOY H_2S monitor which was the subject of MELOY'S Technical Proposal. (Affidavit of Dr. James W. Ross, Jr.).

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[2]ORION also sought to compel disclosure of several intra-agency documents withheld under Exemption 5 (5 U.S.C. §552(b)(5)). This District Court granted summary judgment to the EPA with respect to most of these documents, and the Court of Appeals for the First Circuit affirmed. ORION does not seek review of the Exemption 5 issues in this Petition for Certiorari.

On or about March 15, 1978, The district court ordered that an oral hearing be held on Orion's Motion for Summary Judgment for April 6, 1978. On April 5, 1978, the EPA filed a cross motion for summary judgment alleging that the Technical Proposal was confidential information exempt from disclosure under 5 U.S.C. §552(b)(4) (Exemption 4). In support of its motion, the EPA submitted the affidavit of William E. Mathis, Director of EPA'S Contracts Management Division, dated July 13, 1976 (the "Mathis affidavit").

The Mathis affidavit consisted of: (1) a brief description of the documents; (2) Director Mathis' unqualified and conclusory opinion that future proposers would withhold relevant information from their Technical Proposals if they were

disclosed (or refuse to submit proposals entirely); and (3) his unqualified and conclusory opinion that disclosure would impair EPA information-gathering.

On September 25, 1978, the District Court, sua sponte, ordered the EPA to submit the withheld documents for in camera inspection. The EPA submitted the documents on October 5, 1978.

On June 15, 1979, the District Court (Freedman, J.) granted summary judgment to the EPA with respect to the Meloy Technical Proposal. In its decision, the Court disclaimed reliance on the Mathis affidavit:

> Specifically, the [Mathis] affidavit fails to "show affirmatively that the affiant is competent to testify to matters stated therein"[7] and, it is conclusory rather than a recitation of facts that would be admissable in evidence.

[7] For example, Mathis fails to indicate how long he has served in the capacity of Director of the EPA's Contract Management Division. The Court, therefore, is unaware of the number of years of experience he has. Furthermore, regardless of his tenure, Mathis would be incompetent to testify regarding what other firms would do if Meloy's proposal was disclosed. The government could have offered here affidavits from some of the thirteen firms that submitted proposals. They would, of course, be competent to testify as to what their reaction and future response would be.

After rejecting the Mathis affidavit however, the Court held, on the basis of its sua sponte in camera inspection, that the Meloy Technical Proposal came "within the purview of Exemption 4":

> The information contained in [the Meloy] technical proposal comes within the purview of Exemption 4. If the EPA were ordered to disclose this plan or others like it, its "ability to obtain necessary information in the future" would be impaired.

(5)

See National Parks v. Morton, supra at 770.

> For the EPA to effectively select the most deserving proposal for any contract award, it must be furnished with candid and original bids. If forced to disclose information like that contained in Meloy's proposal, the EPA's chances of receiving those types of bids in the future would be substantially diminished. Competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories. This, of course, would adversely effect the EPA's chances of awarding the contract to the most deserving firm.

On appeal to the First Circuit, the Court of Appeals rubber stamped the opinion of the district court by adopting it at slip opinion p. 5. Thereupon, it cursorily affirmed its decision by holding that it "committed no error of law or abuse of discretion," slip opinion p.6.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SUBSTANTIAL POLICY QUESTIONS CONCERNING GOVERNMENT CONTRACT BIDDING AND THE PUBLIC'S RIGHT TO SCRUTINIZE THE GOVERNMENT AWARDS TO PRIVATE ENTERPRISE

The Supreme Court has never considered the substantive merits of Exemption 4 of the Freedom of Information Act. Yet Exemption 4's importance is shown by the large number of FOIA and reverse FOIA cases which raise Exemption 4 issues. See e.g., Note, Reverse FOIA Litigation; The Need For Congressional Action; 67 GEO. L.J. 103 (1978). The frequently cited construction of Exemption 4 in National Parks Conservation Association v. Morton 498 F. 2d 765 (D.C. Cir. 1974) has almost universally come to replace the text itself:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the info rmation is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Equally important is the application of this construction to government contracting cases.

The instant case brings the construction of Exemption 4 and its application to government contracting into focus. More particularly, Orion was low bidder among thirteen private firms responding to the Government's Request for Proposals for the development of a continuous hydrogen sulfide monitor. Although it was "low bidder" the Government awarded the contract to another private firm, Meloy Laboratories. Shortly there-

after, the EPA refused Orion's request for a copy of Meloy's winning Proposal on the grounds that 1) Meloy had claimed its entire Proposal (including those sections labeled "Program Schedule, Experience and Facilities, and Personal Qualifications") was "confidential information"; 2) future proposers would withhold relevant information from future proposals if the Government released them after a contract award; and 3) disclosure would impair agency information gathering.

The burden of proving exemption under the FOIA is, of course, upon the Government. Hence, in the proceedings below, the EPA submitted an affidavit by William E. Mathis, Director of the agency's Contract Management Division. The District

Court however, rejected the Mathis affidavit as it failed to show that its affiant was competent to testify, that it did not recite facts, and that it was conclusory in nature. The Court also took note that Mathis was "incompetent" to testify as to what other private firms would do if Meloy's Proposal was disclosed, and that the government had not availed itself of the opportunity of submitting affidavits from some of the other firms that submitted proposals to show whether disclosure would discourage them from bidding on future government requests for proposals.

Notwithstanding the court's disclaimer of the only evidence submitted by the EPA, it concluded from its own sua sponte inspection of the Meloy Proposal, and as a matter

of law, that if government agencies were forced to disclose winning bid proposals, the agencies "chances of receiving those types of bids in the future would be substantially diminished". From this, the Court reasoned that Exemption 4 barred disclosure. Leaving aside the fact that such a holding precludes public scrutiny of government contract awards, and in particular the question of why the low bidder was not awarded the contract, the district court opinion conclusively rejects the possibility of Orion's proving that nondisclosure by government agencies discourage bidders from participating in the future, and particularly those whose lower bids were rejected. Clearly, this is an issue which affects thousands of

firms and their dealings with the Government, and one of national importance. As such it deserves plenary consideration by this Court.

We hasten to add on this issue that the district court's policy pronouncements are squarely in conflict with the decision in Shermco Industries v. Secretary of the Air Force, 452 F. Supp. 306 (N.D. Tex. 1978) wherein the Court held at p. 324 that bid proposals were exempt from disclosure under Exemption 4 prior to an agency's awarding of a contract, but subsequent to the agency's selecting a successful bidder, unsuccessful bid proposals must be disclosed. The conflict with the Shermco decision is accentuated in the instant case as the district court's policy holdings were made

with repsect to a contract award made almost four years prior thereto.[3] Accordingly, Orion submits that resolution of these decisions is an additional basis supporting this Court's grant of certiorari.

2. THE DECISION BELOW PRESENTS IMPORTANT PROCEDURAL ISSUES REGARDING THE ADMINISTRATION OF FOIA CASES DEALING WITH EXEMPTION 4 ISSUES.

The burden of proving information exempt under the Freedom of Information Act is upon the government. Coextensive with this burden, is the Agency's obligation to produce sufficient material and information relative to the withheld documents "to permit the requesting party to present its case effectively", Mead

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[3]The EPA made its award to Meloy Laboratories on June 30, 1975. The district court rendered its decision on June 15, 1979, and the Court of Appeals affirmed on February 11, 1980.

Data Central, Inc. v. United States Department of the Air Force, 566 F. 2d 242, 251 (D.C. Cir. 1977), Vaughn v. Rosen 484 F. 2d 820 (D.C. Cir.) cert. denied 415 U.S. 977.

In the proceedings below, the district court disregarded the affidavit submitted by the government on the grounds that it did not recite facts, but rather was "conclusory" in nature, and secondly, that the affiant was not qualified to render an opinion on what effect disclosure would have on future bidding of contracts. Having excluded the only evidence submitted by the EPA, the district judge "concluded from the record that a trial on the merits of this matter would be a misuse of judicial economy". In light of this "conviction" the district court, sua sponte, called

"for an in camera inspection of the materials". On the sole basis of his inspection of the documents, the district court held that disclosure "would have a chilling affect on the willingness of Meloy or other potential bidders to submit proposals to the EPA".

Orion asserts that it was entirely inappropriate for the District Court, having found the EPA's director of contracts lacking in technical expertise, to have sua sponte examined the subject documents in camera and then forecast that future bidders would be inhibited by disclosure of the subject documents. Apart from this fact, the District court was undoubtedly unqualified to render a technical opinion. The District Court procedure short-circuited the adversary process.

Orion was never given the opportu-- nity to present its case effectively because the EPA's affidavit was insufficient, and because it was unable to view the documents. Further, Orion never had the opportunity to examine the EPA's expert witness as it would have if the District Court had denied the EPA's motion for summary judgment. Similarly, Orion never had the opportunity to cross examine the district judge to test the validity of his technical opinion.

Orion maintains that final decisions made solely on the basis of in camera inspections are not appropriate in FOIA cases turning on Exemption 4. More specifically, there were several alternatives available to the District Court. It

could have appointed a Master (FRCP 53(b)) with technical expertise to review and evaluate the withheld documents. It could have invited Orion's outside counsel of record to examine the documents pursuant to suitable protective order (FRCP 26(c)(7)), a technique commonly utilized in trade secret cases. Alternatively, of course, it could simply deny the EPA's motion for summary judgment whereby Orion would have had the opportunity to cross examine the EPA's "say so" witnesses at trial.

Indeed, in a case squarely in point with the instant case, the Court of Appeals for the D. C. Circuit held that summary judgment should not be granted solely on the basis of opinion affidavits alleging

competitive harm. National Association of Government Employees v. Campbell, 593 F. 2d 1023, 1029-30 (D.C. Cir. 1978):

> The affidavits, for the most part, stated merely the conclusions of carrier officials that competitive harm would follow disclosure of the health insurance proposals, and did not supply evidentiary details to support those conclusions. Ofttimes com petitive injury is difficult to establish, and in determining whether such injury will ensue from premature release of the health insurance proposals the factfinder might well be summoned to "exercise its judgment in view of the nature of the materials sought and the competitive circumstances. . .relying at least in part on relevant and credible opinion testimony." But the opinion-evaluation thus necessitated is a task for which a summary judgment motion is ill-suited. The judicial function at that stage, we repeat, is not fact-finding, but rather an ascertainment of whether factfinding is essential to disposition of the litigation, and in no event is summary judgment appropriate unless the movant is entitled to victory as a matter of law.

The issue of whether Exemption 4 cases should be decided solely on sua sponte in camera inspections is common to FOIA cases. Since it addresses fundamental procedural issues of fairness in our adversary process, and in particular, to the administration of justice under the Freedom of Information Act, it deserves this Court's full consideration.

CONCLUSION

For the reasons set forth above, Orion research Incorporated requests this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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